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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1068-1069

ILLINOIS NORTHERN UTILITIES COMPANY,
Petitioner,

vs.

CITY OF GENESEO, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
Petitioner,

vs.

VILLAGE OF HEYWORTH, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

DAVID F. TABER,
Attorney for Illinois Northern Utilities Company, Petitioner.
CLAUDE A. ROTH,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
WILSON & MCILVAINE,
DIXON, DEVINE, BRACKEN & DIXON,
HENRY WATERMAN,
GOTTLIEB & SCHWARTZ,
Of Counsel.

THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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A. No jurisdiction existed in the Commission to entertain or determine the purely judicial issues on which the Supreme Court of Illinois on review predicated its decision. Such issues were not relevant to any question properly before the Commission. Determination by the court of issues not made by the record before the Commission, violates the due process requirements of the Fourteenth Amendment that the court have jurisdiction.

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B. Petitioners have not been afforded an opportunity to be heard on the judicial questions of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and of whether, if granted, the Public Utilities Act repealed such power because the Commission, as the trial tribunal, had no jurisdiction and in fact was precluded by the decisions of the Supreme Court from exercising jurisdiction to entertain or determine these judicial questions.

II. 24

A. Petitioners' circuit court judgments, entered on authority of the first Geneseo case confirmed in them the right to continue utility operations in the streets of respondents. The Supreme Court in deciding that Heyworth and Geneseo have the power to oust petitioners has thereby annulled those judgments. This has been done without jurisdiction and in an arbitrary manner.

B. Petitioners have had no opportunity to be heard or to present their defenses with respect to the validity and scope of the prior judgments in the Geneseo and Heyworth ouster suits. Those questions were not before the Commission and no evidence with respect to those prior cases and pleadings therein and the issues formed by said pleadings was or could have been presented to the Commission or was before the Supreme Court of Illinois, which was empowered to act solely on the record made before the Commission.

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VILLAGE OF HEYWORTH, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Illinois Northern Utilities Company (hereinafter sometimes referred to as "Northern") and Central Illinois Electric and Gas Company (hereinafter sometimes referred to as "Central") petition this Court for a writ of certiorari to review a judgment of the Supreme Court of Illinois reversing and remanding judgments of two circuit courts of Illinois which affirmed orders of the Illinois Commerce Commission dismissing complaints against petitioners, and in support of this petition respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Parties to the Proceeding.

Petitioners are public utility operating companies furnishing electricity and other utility services wholly within Illinois. Respondents, City of Geneseo (hereinafter sometimes referred to as "Geneseo") and Village of Heyworth (hereinafter sometimes referred to as "Heyworth") are Illinois municipalities, the former having been incorporated in 1865 under a special charter from the Illinois Legislature and the latter deriving its municipal powers from the Cities and Villages Act of Illinois (Ill. Rev. Stat. 1941, ch. 24). Respondent, Illinois Commerce Commission (hereinafter sometimes referred to as "Commission") is an administrative body created by the Public Utilities Act of Illinois (Ill. Rev. Stat. 1941, ch. 111⅔) and is vested by that act with broad and comprehensive powers of regulation, supervision and control of public utilities and their instrumentalities. Petitioners hold certificates of convenience and necessity under said Public Utilities Act from the Commission to operate integrated utility systems in furnishing electricity for public use within the respondent municipalities and within unincorporated territory and other municipalities in the same general vicinity within the State of Illinois.

Previous to the filing with the Commission of the complaints which culminated in the final judgment sought to be reviewed by this petition, Geneseo and Heyworth had instituted in the Circuit Courts of Henry and McLean Counties ouster suits against Northern and Central for mandatory injunctions to compel Northern and Central to

vacate their streets and to cease furnishing electricity within their corporate limits. The circumstances leading to the filing of the ouster suits and the rights adjudicated by the judgments rendered therein are as follows.

The Judgment Obtained by Northern in Judicial Proceedings in Illinois.

In 1923 Geneseo, by ordinance, granted to Northern the right to occupy its streets and furnish electric service for a period of ten years. When that ordinance expired in 1933 Northern declined to remove its equipment and continued to furnish electric service in Geneseo. Thereupon, Geneseo passed an ouster ordinance directing Northern to vacate the streets. Suit was filed by Geneseo in the Circuit Court of Henry County to enforce that ouster ordinance. The prayer of Geneseo's complaint was that a mandatory injunction issue directing Northern to remove its equipment from the streets. The circuit court upheld the ouster ordinance as valid and granted the mandatory injunction, after first sustaining Geneseo's motion to strike the answer of Northern. Northern took an appeal directly to the Supreme Court of Illinois on the ground that the validity of an ordinance was involved, namely the ouster ordinance. (Ill. Rev. Stat. 1941, ch. 110, § 199.) That court reversed the decree of the circuit court and remanded the cause, with directions to overrule the motion to strike the answer of Northern. *City of Geneseo* v. *Illinois Northern Utilities Co.*, 363 Ill. 89. (Rec. 301.) That decision is sometimes hereinafter referred to as the "first Geneseo case".

The decision of the Supreme Court held in that case that the provisions of the Public Utilities Act had withdrawn from municipalities the power which they had previously exercised in relation to the use of the streets by public utilities and had conferred such power upon the Com-

mission; that franchise ordinances in so far as they interfere with the Commission in the exercise of the regulatory powers granted it by the Public Utilities Act were abrogated; and that Geneseo had no power to enact the ouster ordinance and was without legal power and authority to maintain the suit.

The Circuit Court of Henry County, on remandment, overruled the motion to strike the answer pursuant to the judgment and mandate of the Supreme Court of Illinois, and, on bill and answer, entered a judgment in favor of Northern dismissing Geneseo's suit (Rec. 31). That judgment has never been reversed, modified or annulled except by the judgment herein sought to be reviewed.

The Judgment Obtained by Central in the Circuit Court of McLean County, Illinois.

In 1907 Heyworth, by ordinance, granted to Central the right to occupy the streets of Heyworth and to furnish electric service therein. In 1932 this ordinance expired, and Central declined to remove its equipment and continued to furnish electric service in Heyworth.

Heyworth also passed an ouster ordinance directing Central to vacate the streets. Suit was instituted by Heyworth in the Circuit Court of McLean County to enforce the ouster ordinance. Heyworth prayed in its complaint that a mandatory injunction issue directing Central to remove its equipment from the streets. Before final decree was entered in this case, but after hearing, the Supreme Court of Illinois decided the first Geneseo case.

In an opinion dated October 31, 1936, the Circuit Court of McLean County considered the right of Heyworth to a mandatory injunction ousting Central, and said (Rec. 119):

> "The first question, that of the ouster of the Central Company, can be disposed of in a few words. Subsequent to the institution of this action by the Village

of Heyworth the Supreme Court of this State has had occasion to pass upon the identical question. In the case of *City of Geneseo* v. *Illinois Northern Utilities Co.*, 363 Ill. 89, it was held in effect that by virtue of the provisions of the Public Utilities Act of 1921 a municipality had been deprived of any right to exercise control over the instrumentality of a public utility occupying the streets thereof, but that such questions were now within the exclusive jurisdiction of the Illinois Commerce Commission. By virtue of the recent statement of the Supreme Court the relief sought by * * * Heyworth * * * cannot be granted. * * *"

On November 2, 1936, that court gave judgment in favor of Central and dismissed the complaint of Heyworth (Rec. 119). This judgment was never taken to a higher court and it has never been reversed, modified or annulled except by the judgment herein sought to be reviewed.

The Proceedings Sought to Be Reviewed.

After the above mentioned unsuccessful attempts to maintain ouster proceedings against petitioners in the courts, respondents filed identical complaints with the Commission, an administrative body having no judicial powers.* These complaints asked the Commission to order petitioners to remove their facilities from respondents' streets and to discontinue their electric serv-

* Such jurisdiction as the Commission has of complaints exists by virtue of Section 64 of the Public Utilities Act wherein it is provided that "complaint may be made by any person * * * or municipal corporation by petition or complaint in writing setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provisions of this Act, or of any rule or order of the Commission." (Ill. Rev. Stat. ch. 111⅔, § 68.)

The limited jurisdiction of the Illinois courts to review an order of the Commission exists by virtue of Section 68 of the Public Utilities Act wherein it is provided that any person affected may within specified time limits appeal to the courts "for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined" and that "no new or additional evidence may be introduced in any proceeding upon appeal * * * but the appeal shall be heard on the record of the commission" and, further, that "a rule, regulation, order or decision of the commission shall not be set aside unless it clearly appears that the finding was against the manifest weight of the evidence * * * or that the same [order] was without the jurisdiction of the Commission." (Ill. Rev. Stat. 1941, ch. 111⅔, § 72.)

ice (Rec. 1, 71). The grounds upon which respondents based their claim for this relief were that petitioners' ordinances had expired; that respondents had installed municipal plants capable of supplying the electrical requirements of the public within the municipalities; that respondents had passed ordinances ordering petitioners out of the municipalities which they refused to obey; and that the presence and operation of petitioners' facilities caused a wasteful condition and were detrimental to the business of the municipal plants.

In their answers petitioners asserted that the public interest would be injuriously affected by orders requiring them to cease operations in the municipalities; that they were operating in each of the municipalities by virtue of certificates of public convenience and necessity from the Commission and had in nowise violated the terms of said certificates or any order or rule of the Illinois Commission, or any requirement of the Public Utilities Act (Rec. 5, 75, 82).

After hearing, the Commission entered orders dismissing the complaints of Geneseo and Heyworth (Rec. 42, 128). In each of the two orders the Commission stated that it conceived "the effect of the Supreme Court decision in the *Geneseo* case to be that the question of whether or not a public utility should discontinue service in a municipality after the expiration of its ordinance is a matter to be determined by this Commission and that such determination should be made in accordance with the just and reasonable requirements of public convenience and necessity, that is, whether or not the respondent public utility now serves a useful purpose" in the municipality, as contemplated by the Public Utilities Act. The orders found, in substance, that the public interest would not be served by ordering petitioners to remove their facilities and discontinue utility operations in the municipalities (Rec. 50, 53, 136, 139).

These orders were appealed to the Circuit Courts of Henry and McLean Counties, respectively, for the purpose of having their reasonableness or lawfulness determined under section 68 of the Public Utilities Act (Ill. Rev. Stat. 1941, ch. 111⅔, §72). These courts affirmed the orders (Rec. 62, 146).

Thereupon Geneseo and Heyworth appealed the affirming orders of the circuit courts directly to the Supreme Court of Illinois under section 69 of the Public Utilities Act (Ill. Rev. Stat. 1941, ch. 111⅔, § 73). On April 10, 1941, that court rendered its first opinion (Rec. 157) in which it stated that it had re-examined the decision in the first Geneseo case; that that decision was not consistent with the then views of the court and to that extent was overruled. The decision held that the Cities and Villages Act granted to Geneseo and Heyworth the power to oust Northern and Central and that the Public Utilities Act had not repealed such grant.

The decision of the Supreme Court rendered April 10, 1941, was that the orders of the circuit courts be reversed and the respective causes be remanded, with directions to proceed in conformity with the views expressed in the opinion. The effect of that decision would have been to enforce a power in Geneseo and Heyworth to oust Northern and Central, the very thing which the judgments in the prior ouster suits had determined Geneseo and Heyworth had no power to do.

Petitioners filed a petition for rehearing in which they specifically set forth and claimed that the decision of April 10, 1941, violated the rights guaranteed to them by the Fourteenth Amendment in that said decision operated to annul the judgments in the former ouster suits and that said decision, without the court having jurisdiction and without affording petitioners an opportunity to be heard and present their defenses, held that the Cities and

Villages Act granted the power of ouster to Geneseo and Heyworth and that the Public Utilities Act did not repeal such grant (Rec. 163).

The Attorney General of the State of Illinois, who, by the provisions of the Public Utilities Act is required to represent the Commission and defend its orders and decisions in all appeals therefrom (Ill. Rev. Stat. 1941, ch. 111⅔, § 72a) also filed a petition for rehearing urging, among other things, that the Commission had approved the issuance by utilities of millions of dollars in securities in reliance upon the court's prior decision in the first Geneseo case, and that the reversal by the court of its position as pronounced in that decision would restrict the financing of public utilities within the State of Illinois and interfere with the power of the Commission to require extensions and additions to their plants and affect, to the public detriment, the rates of the utilities of the State (Rec. 161).

The applications for rehearing were granted on June 18, 1941 (Rec. 177).

On November 24, 1941 (Rec. 249) the judgment herein sought to be reviewed was entered by the Supreme Court of Illinois (two Justices dissenting) reversing the judgments of the Circuit Courts of Henry and McLean Counties, and remanding the causes to said courts with directions to remand to the Commission to enter orders in each case in accordance with the views expressed in the opinion accompanying the judgment (Rec. 269).

This decision of November 24, 1941, holds that the judgments in the former ouster suits did not adjudicate the issues of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and of whether the Public Utilities Act had repealed such grant. It holds that there were three issues presented in the first Geneseo case, two of which concerned the jurisdiction of the circuit court

of the ouster suit and the third of which involved the power of Geneseo to enforce ouster.

It holds that only the third issue would prevent any further action by Geneseo to enforce ouster and that since the court was unable to tell on which issue the judgment was based, the first Geneseo case was not conclusive of the right of Geneseo and Heyworth to enforce ouster. The decision further holds that the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and that such grant was not repealed by the Public Utilities Act.

The effect of the decision is to hold that Geneseo and Heyworth have the power to enforce ouster against petitioners, the very issue which had been decided to the contrary in each of the prior ouster suits.

On November 25, 1941, petitioners filed a motion with the Supreme Court to stay the mandate and for leave to file suggestions for a reconsideration of the opinion of November 24, 1941 (Rec. 271, 274). The suggestions for reconsideration were submitted to the court. The suggestions specifically set up and claimed that the decision deprives petitioners of their property in violation of due process because failing in the primary requirements of jurisdiction and an opportunity to be heard.

The suggestions also claimed that the decision was arbitrary in holding: (1) that the Cities and Villages Act applied to Geneseo, a special charter city not controlled by the Cities and Villages Act; (2) that the first Geneseo case was determinative of Central's immunity from ouster by Heyworth, and (3) that two of the three issues in the first Geneseo case involved the jurisdiction of the Circuit Court (Rec. 274, 283-287).

This motion was denied on January 22, 1942 (Rec. 297).

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 344(b).

The Supreme Court of Illinois is the highest court of Illinois in which a decision in this case could be had. The decision sought to be reviewed was entered November 24, 1941, and on February 6, 1942, an extension of time was granted to petitioners by Mr. Associate Justice Byrnes to and including March 24, 1942, within which to file this petition for a writ of certiorari (Rec. 308).

The decision herein of the Supreme Court of Illinois is a final judgment. *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 240.

The Commission is an administrative agency. Its functions concern only matters of public convenience and necessity, and public convenience and necessity was the only criterion on which it could entertain and determine the present complaints. It was on the finding that public convenience and necessity did not warrant discontinuance of petitioners' services in Geneseo and Heyworth that the Commission entered the orders dismissing the complaints. When these orders came before the Supreme Court on review, that court ignored the record made before the Commission on public convenience and necessity and did not consider whether the Commission's findings thereon had substantial support in the evidence. The court substituted for the administrative question of public convenience and necessity the purely judicial questions, namely, whether petitioners could be divested of rights obtained by them

under the circuit court judgments in the ouster suits, whether the Cities and Villages Act granted the power of ouster to Geneseo and Heyworth and, if granted, whether such grant was repealed by the Public Utilities Act, which issues were outside the scope of the jurisdiction of the Commission.

Petitioners specifically set up and claimed in their answers before the Commission that their certificates of convenience and necessity constituted valuable property rights and that to divest them of such rights on the basis of the complaints of the respondent municipalities would be to deprive petitioners of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioners specifically set up and claimed before the Supreme Court of Illinois that the judgment of that court herein sought to be reviewed deprived petitioners of their property in violation of the due process clause of the Fourteenth Amendment, in that:

A. The right of petitioners, under their certificates of convenience and necessity and under their judgments in the former ouster suits, to furnish electricity in Geneseo and Heyworth and to operate electric facilities situated in the streets in Geneseo and Heyworth, until found by the Commission that their so doing was not consistent with public convenience and necessity, is "property" within the protection of the Fourteenth Amendment.

B. The circuit court judgments obtained by petitioners on the authority of the first Geneseo case, 363 Ill. 89, confirmed in them the right to continue their utility operations in the streets of the municipalities after the expiration of their franchise ordinances and such right constitutes a property right under the protection of the due process clause of the Fourteenth Amendment. The Supreme Court of Illinois, in holding by its decision in this case, that a municipality has the power to oust the utility from its streets after the expiration of its franchise ordinance and in directing

that the Commission enforce the ouster ordinances of Geneseo and Heyworth has annulled the circuit court judgments. These judgments could in no wise be an issue in these proceedings and the Supreme Court of Illinois could annul those judgments only in a mode provided by law. The Supreme Court lacked jurisdiction to annul the judgments in these proceedings.

C. The Supreme Court of Illinois in these proceedings has only the limited jurisdiction conferred upon it by the Public Utilities Act to ascertain and determine, on the basis of the record before the Commission, the reasonableness and lawfulness of the Commission's order, and, when acting pursuant to such restricted authorization, is wholly wanting in jurisdiction to adjudicate the issue of whether the Cities and Villages Act granted power to Geneseo and Heyworth to oust petitioners, or to adjudicate the issue of whether the Public Utilities Act repealed such grant, neither of those issues being a question within the jurisdiction of the Commission or determined by the order of the Commission or embodied in the record under review by the court.

D. The questions of whether the Cities and Villages Act granted to Geneseo and Heyworth the power to oust petitioners and whether, if granted, the Public Utilities Act repealed such power, and the question of the validity of the prior judgments in the Geneseo and Heyworth ouster suits were not within the jurisdiction of the Commission to entertain or determine and consequently petitioners have had no opportunity to be heard or present their defenses with respect to those questions; the review by the court being confined to the record made before the Commission.

Petitioners specifically set up and claimed the protection of the due process clause of the Fourteenth Amendment with respect to the foregoing federal questions in their answers before the Commission (Rec. 12, 86), in their petition for rehearing (Rec. 163, 165, 166, 173, 174), in their answer to the reply to the petition for rehearing

(Rec. 221, 225-228, 240-246), and in their suggestions for reconsideration by the court of its judgment (Rec. 275, 283-287). The first opportunity to raise the federal questions with respect to the power of the Supreme Court of Illinois in reviewing the orders of the Commission arose after the Supreme Court had rendered its first decision and therefore those questions were first urged in the petition for rehearing.

This case could be decided only by deciding the foregoing federal questions. By its decision the court held against petitioners on each of these questions.

III.

QUESTIONS PRESENTED.

Are the due process primary requirements of jurisdiction and hearing violated where the Supreme Court of Illinois, vested only with power to determine, on the basis of the record before the Commission, the reasonableness or lawfulness of the Commission's order, holds that the Cities and Villages Act grants power to Geneseo and Heyworth to oust petitioners, when that issue was not made by the record before the Commission, and under the then prevailing law could not have been entertained or determined by the Commission?

Does the judgment of the Supreme Court sought to be reviewed deprive petitioners of their property rights vested in them by their judgments in the former ouster suits? If so, did the Supreme Court have jurisdiction?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

So far as we have been able to discover by a careful search of the reported cases, this Court has had no previous occasion to determine the precise questions here presented.

The issues determined by the decision sought to be reviewed and which petitioners claim were determined without due process, detrimentally affect not only the rights of petitioners, but the rights of all utilities in the State of Illinois, their customers and security holders. Mr. Justice Stone of the Supreme Court of Illinois, dissenting in this case, said that the decision of the court would subject the investment of purchasers of utility bonds to a drastic "shrinkage in value." (Rec. 270.) The Attorney General of the State of Illinois expressed the same views in his petition for rehearing. (Rec. 161, 162.)

The jurisdiction of the Supreme Court of Illinois to review an order of the Commission is conferred by the Public Utilities Act and is limited to the power to ascertain and determine the reasonableness and lawfulness of the order on the record made before the Commission. Upon the review of the Commission's orders involved in this case, the Supreme Court, instead of confining itself to the reasonableness or lawfulness of the Commission's orders upon the records made before the Commission, entertained and decided the legal questions of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth, whether the Public Utilities Act repealed such grant, and whether the judgments in the former ouster suits were valid. The decision of the Supreme Court is

that the Cities and Villages Act granted power of ouster to Geneseo and Heyworth; that the Public Utilities Act did not repeal such grant and that the judgments in the former ouster suits are invalid.

The primary requirements of due process must necessarily lie at the very foundation of review by courts of orders of administrative bodies. By deciding this case as it has the Supreme Court of Illinois has violated the primary requirements of due process and its decision is contrary to principles announced in decisions of this Court. Parties are permitted to try their cases before administrative bodies only upon issues over which such bodies have jurisdiction. On a court review of the record covering the evidence on issues heard and decided by the administrative body, parties are entitled to the safeguards of due process of law against the injection into the case on review of issues which the parties have not had an opportunity to be heard upon below.

This Court has held that at the threshhold of due process of law, as guaranteed by the Fourteenth Amendment, is the question of jurisdiction, and if that does not exist, there is no due process. *Illinois Natural Gas Co.* v. *Central Ill. Pub. Ser. Co.*, 314 U. S. ....; *Twining* v. *New Jersey*, 211 U. S. 78, 111; *Andrews* v. *Andrews*, 188 U. S. 14; *Scott* v. *McNeal*, 154 U. S. 34, 46.

This Court has also held that the due process requirement of an opportunity to be heard and present defenses is violated where a court decides an issue outside of the record and on which, because of the limited jurisdiction of the trial tribunal, presentation of evidence and consideration of the issue were prohibited. *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673, 681; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 426; *Reynolds* v. *Stockton*, 140 U. S. 254, 266, 268; *Windsor* v. *McVeigh*, 93 U. S. 274, 282.

This Court has further held that due process precludes re-examination, modification or annulment of a judgment rendered by a court of competent jurisdiction in litigation between the same parties, except in a mode provided by law. *McCullough* v. *Virginia,* 172 U. S. 102; *Garrison* v. *City of New York, etc.,* 21 Wall. 196.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said court in the consolidated cause numbered and entitled on its docket as Nos. 25930 and 25933, *City of Geneseo, Illinois, Appellant* v. *Illinois Northern Utilities Company, Appellee,* and *Village of Heyworth, Illinois, Appellant* v. *Central Illinois Electric and Gas Company, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that said judgment of the Supreme Court of Illinois may be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated March 23, 1942.

DAVID F. TABER,
Attorney for Petitioner, Illinois Northern Utilities Company,

CLAUDE A. ROTH,
Attorney for Petitioner, Central Illinois Electric and Gas Company.

ISHAM, LINCOLN & BEALE,
WILSON & MCILVAINE,
DIXON, DEVINE, BRACKEN & DIXON,
HENRY WATERMAN,
GOTTLIEB & SCHWARTZ,
Of Counsel.